

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION AT COLUMBUS**

In re: OHIO EXECUTION  
PROTOCOL LITIGATION,

: Case No. 2:11-cv-1016

Chief Judge Edmund A. Sargus, Jr.  
Magistrate Judge Michael R. Merz

This Order relates to Plaintiffs  
Phillips, Tibbetts, and Otte

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**DECISION AND ORDER DENYING WITHOUT PREJUDICE  
PLAINTIFFS' MOTION TO MODIFY SCHEDULING ORDER**

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This case is before the Court on Plaintiffs' Motion to Modify the Scheduling Order filed yesterday, November 30, 2016 (ECF No. 747). That Scheduling Order (ECF No. 746), filed on November 29, resulted from a scheduling conference held the day before. Unlike the prior scheduling conference, the one on November 28, 2016, was not preceded by any filing of suggested topics for the agenda, including any suggestions of dates or amount of time for the preliminary injunction hearing.

At the time of the conference, the Court was aware that at least several preliminary injunction hearings in this case heard before Judge Frost had been set for one day's duration. With that in mind, the Court initially offered twice that amount of time, January 3 **and** 4, 2017. Plaintiffs objected that Mr. Tibbetts' interview with the Parole Board is set for January 3 and

counsel wished to be present. They rejected defense counsel's suggestion that Mr. Tibbetts' representation on that day at least could be split among the lawyers who represent him. The Court therefore set the hearing for January 4-5, 2017, with no objections from Plaintiffs' counsel.

In the instant Motion, Plaintiffs state they "expected to have more than a single day to present their evidence." (ECF No. 46, PageID 23303). They had not said so before filing this Motion. Plaintiffs provide no names or numbers of witnesses or expected length of testimony. Instead, they speak generally of the "magnitude of the pending issues, and the complexity of this case in general." *Id.* at PageID 23302. They now offer as possible additional days for hearing January 2, 3, 6, and 7, 2017, and request at least one additional day for their case-in-chief or for rebuttal. In compliance with S. D. Ohio Civ. R. 7.3, Plaintiffs report they have consulted Defendants, but report only that they "oppose the request."

As the Court advised counsel on November 28, the hearing is set as late as the Court believed it could be set and still allow a proper decision which is not riddled with error. As things now stand, the hearing will end less than one week before Mr. Phillips is scheduled to be executed. As counsel are aware, this Court may not merely decide the preliminary injunction motion, but must make findings of fact and conclusions of law. This judicial officer is accustomed to working Saturdays and works on more court holidays than not, but opening the courthouse and providing security on such days requires cooperation of the General Services Administration, which is not easily obtained.

The Motion to Modify is DENIED, but may be promptly (i.e., not later than 4:00 p.m. on December 2, 2016) renewed within the following parameters:

1. The Court is willing to begin the hearing on January 3, 2017. (No one has suggested an earlier date except for the unacceptable January 2.)
2. Counsel for the parties must confer and attempt to negotiate a total amount of time for the hearing, which should include rebuttal time for Plaintiffs.

3. Counsel must contemplate how important it is to have a decision from the Sixth Circuit on the pending appeal and whether a short extension of time can be agreed upon to allow the court of appeals to decide the matter before it.

December 1, 2016.

s/ *Michael R. Merz*  
United States Magistrate Judge